LIBRARY
SUPREME COURT, U. S

No. 70-209

In the Supreme Court of the United States

OCTOBER TERM, 1970

JOSEPH AIUPPA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit.

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

MAURICE J. WALSH
CARL M. WALSH
29 South LaSalle Street
Chicago, Illinois 60603
(312) 332-7374
Attorneys for Petitioner.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-209

JOSEPH AIUPPA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit.

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

1. The Brief of the United States In Opposition to the grant of Certiorari reflects substantial deterioration in the sensitivity of the Solicitor General's office to prejudicial publicity.

In the Petition for Certiorari, there was cited the decision of this Court in *Janko* v. *United States,* 366 U.S. 716, where this Court, after the confession of error by the

Solicitor General, reversed a conviction on facts strikingly similar to the case of the Petitioner. The *Janko* case and the case at bar each lasted two days. The articles complained of in each case emphasized the finding of guilt of the defendant in a former trial where the conviction had been reversed.

The Tenth Circuit Court of Appeals in this case at bar stated, "The stories were, to be sure, prejudicial." (Pet. App. 20.) *Aiuppa* v. *United States*, 393 F.2d 597, 604.

Nothing justifies the statement by the Solicitor General concerning "the non-inflammatory nature of the articles".

The description of the newspaper stories given by the Tenth Circuit Court of Appeals at Pet. App. 18 and 19, emphasizes that there was available for jury consumption and prejudice, the published statement that the Petitioner was a "Gangland Figure Found Guilty in 1963 But Won Appeal", Pet. App. 18. This article went on to discuss the Petitioner's first trial, conviction and sentence and the suppression by the Court of Appeals of "more than 500 doves" found "in the trunk of the Aiuppa Cadillac". This evidence was suppressed after the first trial, and of course, to inform the jury of these facts, not admissible in the trial, could result in nothing other than extremely substantial prejudice.

The next quote at Pet. App. 19, in the second paper complained of, the Kansas City Times, was headlined, "Two Freeze Up in Aiuppa Case; Government Witnesses Refuse to Answer in Second Trial. Now Vague on Details". A subheadline erroneously read, "Judge Asks One 'Who Told You' to Forget Answers?" This article then recited various occurrences of the trial. *Aiuppa* v. *United States*, 393 F.2d 597, 603.

The fact was that the Judge did not ask this question, it was asked by the prosecutor. If a juror did infer from the newspaper article that the Judge had asked such questions of a witness, possibly out of his presence, irreparable damage would have occurred.

The complaint below and here is not that the Court failed to grant a mistrial, forthwith. The complaint is that the Court failed to take the least of the precautions suggested in *Sheppard* v. *Maxwell,* 384 U.S. 333 and cases following it.

2. After the Court had been made aware of the publication of these newspapers which were available in the stores and shops of Fort Scott, Kansas, the Trial Court then aggravated the peril of prejudice to the defendant by permitting the jury, after having heard the arguments of counsel and the instructions of the Court and being sworn for deliberation, to interrupt deliberation and to separate for lunch, and to re-assemble for further deliberation and verdict, after the possibility of exposure to the Kansas City Star and the Kansas City Times articles, held by the Court of Appeals below to be prejudicial, "to be sure". The practice of permitting jurors, having been sworn for deliberation, to separate from each other, is not consistent with the traditions of the jury system. There is no reason why a Fort Scott citizen on trial in the federal court should not be afforded the safeguards of a citizen of Chicago, as the government suggests in its Brief in Opposition.

The right to trial by jury is one of the few Constitutional guarantees not under attack by reformers, at this point. The gradual erosion of the secrecy of deliberation and the protection of the jurors from contamination in this day of prejudicial communications, will result from tolerance of the errors complained of.

3. The government draws the inference that it was to protect the Petitioner against his own bad judgment that Petitioner was overruled on his objection to the giving of the instruction described in the footnote at Page 5 of the government's Brief in Opposition.

The Petitioner believes the giving of the instruction over objection was error.

The Petitioner further urges the Court that the emphasizing of a few words and a recitation of the brief statute on the subject will make apparent his further objection to the language and form of the instruction which clearly give an inference that in the natural and regular course of events, the defendant ought to testify. The instruction given was as follows (Pet. App. 17):

> "The law does not *compel* a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the *failure* of a defendant to testify.
>
> "The legal theory for this rule is immaterial so far as you are concerned, but the important and vital point for you, as jurors, is that a defendant has the *unqualified right not to take the stand* and you may not in any manner draw any inference against the defendant because he did not take the stand."

Section 3481, Title 18, reads as follows:

> "§3481. Competency of accused
>
> "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

The discussion of compulsion and of failure to testify constitute unfair comment, over objection, on the defendant's determination not to request to be a competent witness in his own behalf. Discussion of the Constitutional disability of the prosecutor to "compel" the defendant to testify has no place in such an instruction. No implication should be given to the jury that there was a "failure" to testify. While the word "failure" is used in the statute, it merely modifies the making of a request to become a witness, and certainly could not have been intended as regarding a witness' abstention from testifying as a "failure".

To give any instruction on the subject over the objection of the defendant was comment upon the Petitioner's determination not to testify. This Court has held that a reviewing court may not assume that jurors, if properly admonished, neither could nor would heed, instructions that failure of the accused to be a witness "shall not create any presumption against him". *Bruno* v. *United States* (1939), 308 U.S. 287, 84 L.Ed. 257, 60 S.Ct. 198. This Court has further held that a judge's or prosecutor's comment on the accused's silence as evidence of guilt is reversible error. *Griffin* v. *California*, 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229. In that opinion, the Court made this comment:

> "What the jury may infer given no help from the Court is one thing. What it may infer when the Court solemnizes the silence of the accused (into evidence) against him is quite another."

The Court further, in a footnote 6, at 380 U.S. 615, said:

> "We reserve decision on whether the accused can require, as in Bruno v. United States, 308 U.S. 287, 84 L.Ed. 257, 60 S.Ct. 198, that the jury be instructed that his silence must be disregarded."

It is respectfully urged that if the defendant chooses, as the Petitioner did in the case at bar, to have no comment at all upon his silence, he should be afforded this constitutional and statutory right without interference or qualification by statements regarding his "failure" and the fact that the law affords the prosecutor no process to "compel him" to testify. It is respectfully urged that this is a subject that requires the explicit direction of this Court concerning the right to comment over objection on the defendant's silence, and the choice of language in such an instruction, so that persuasive language and words charging failures and prosecutor's disability to compel testimony will be avoided.

Respectfully submitted,

MAURICE J. WALSH
CARL M. WALSH
29 South LaSalle Street
Chicago, Illinois 60603
(312) 332-7374

July 26, 1971.